

1 WO

2
3
4
5
6 NOT FOR PUBLICATION

7
8
9
10
11
12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE DISTRICT OF ARIZONA

14 ABC Sand and Rock Company Incorporated, No. CV-16-01129-PHX-JJT
15 Plaintiff,
16 v.
17 Maricopa, County of, *et al.*,
18 Defendants.

19
20
21
22
23
24
25
26
27
28 ORDER

Plaintiff ABC Sand & Rock Co., Inc. (“ABC”) filed a Motion for a Temporary Restraining Order with Notice and Preliminary Injunction (Doc. 2, Prelim. Inj. Mot.) against Defendants in this matter. Defendants are the County of Maricopa, the Maricopa County Flood Control District (the “District”), and individual Defendants and their spouses. The Board of Hearing Review (“BoHR”) is an entity created by Arizona statute to review enforcement orders that the District’s chief engineer issues. ABC has named as Defendants individual former and present members of the BoHR and their spouses, which the Court refers to collectively as “BoHR Defendants.”¹ The remaining individual

¹ The BoHR Defendants include the following Board members and their spouses: Robert Dewayne Justice and Jane Doe Justice, Melvin Martin and Jane Doe Martin, Hemant Patel and Jane Doe Patel, Scott Ward and Jane Doe Ward, Wylie Bearup and Jane Doe Bearup, Richard Schaner and Jane Doe Schaner, Gregg Monger and Jane Doe Monger, Robert Larchick and Jane Doe Larchick, and Ray Dovalina and Jane Doe Dovalina.

1 Defendants and their spouses² were or are employees, officers, or agents of the District
2 during the relevant period. Because these individuals and their spouses, Maricopa
3 County, and the District are jointly represented, the Court refers to these Defendants
4 collectively as the “District Defendants.”

The BoHR Defendants filed a Response to ABC's Motion for a Temporary Restraining Order with Notice and Preliminary Injunction (Doc. 9, BoHR Defs.' Resp.), as did the District Defendants (Doc. 10, District Defs.' Resp.). Also at issue in this case are the following Motions: the BoHR Defendants' Motion to Dismiss (Doc. 25, BoHR Defs.' MTD), to which ABC filed a Response (Doc. 27, Pl.'s Resp. to BoHR Defs.' MTD) and the BoHR Defendants filed a Reply (Doc. 29, BoHR Defs.' Reply); and the District Defendants' Motion to Dismiss (Doc. 37, District Defs.' MTD), to which ABC filed a Response (Doc. 57, Pl.'s Resp. to District Defs.' MTD). The Court did not await the District Defendants' Reply for reasons that follow.

14 On April 21, 2016, the Court held a hearing, at which it denied ABC's request for
15 a temporary restraining order. (Doc. 11.) On July 21 and 22, 2016, the Court held a
16 Preliminary Injunction hearing and took the matter under review. (Docs. 42, 44.)

17 | I. BACKGROUND

18 || A. Factual Background

ABC is a sand and gravel mining operation along the Agua Fria River near the Phoenix metropolitan area that has been in operation since 1985. The District is responsible for operating and maintaining flood control works and storm drainage facilities. It may issue permits for operation in the floodplain area as well as adopt and enforce civil penalties for violations of its regulations. The District regulates and issues permits to mining operations like ABC as part of its floodplain management duties.

This case arises from a protracted on-going dispute between ABC and the District regarding ABC's permission to mine in the floodplain. ABC alleges the issues began around February 2011, when the owner of ABC, David Waltemath, sent a letter to the District in which he voiced his concerns about the District's proposed new regulations. (See Pl.'s Prelim. Inj. Hr'g Ex. 9.) In his letter, which ABC characterizes as "politically charged," Mr. Waltemath laments the "crushing tide of debilitating regulations accompanied by the constant barrage of costly new requirements, staggering increases in fees, devastating assessments and a firestorm of crippling restrictions" that "has created an insurmountable nightmare that has finally eliminated the opportunity to move forward." (Pl.'s Prelim. Inj. Hr'g Ex. 9 at 1.) Mr. Waltemath continued, "[t]herefore, the only action required for the [District] at this time is a simple summary approval, renewing [ABC's] current permit." (See Pl.'s Prelim. Inj. Hr'g Ex. 9 at 1.)

ABC's then-current mining permit was set to expire around the same time in 2011. ABC argues that pursuant to the District's historical practices and according to the then-current Floodplain Regulations for Maricopa County (the "Regulations"),^{3, 4} its mining permit should have been deemed renewed when it paid the appropriate fees. Instead, the District requested additional information from ABC, and on May 31, 2011, issued a Notice of Violation—Cease and Desist Order ("NOV")—an enforcement violation against ABC that stated ABC was engaging in activity with an expired floodplain use permit. (See Pl.'s Prelim. Inj. Hr'g Ex. 15.) ABC contends that these actions were the beginning of the District's retaliation against ABC in response to ABC's vocalization of its political views.

³ See Floodplain Regulations for Maricopa County §§ 501–03 (governing the process for obtaining an initial permit); §§ 1101–03 (governing enforcement procedures for violations of an existing permit), Flood Control District of Maricopa County (2006). (Pl.’s Prelim. Inj. Hr’g Ex. 8.)

⁴ The Court takes judicial notice of the BoHR Orders, state court Orders, Floodplain Regulations for Maricopa County, and other court filings attached to the parties' filings and provided as exhibits at the Preliminary Injunction Hearing because they are matters of public record. See *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001); *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992).

1 Since then, ABC and the District have engaged in a dispute both in court and out
2 of court as to whether ABC is entitled to continue its mining operations. ABC states that
3 during the course of its interactions with the District, it believed it was operating under a
4 valid 2011 to 2016 permit, which the District denies. ABC argues that it has continually
5 attempted to comply with the District's requirements, but the District constantly changes
6 the conditions that ABC must meet to obtain a permit. In response, the District contends
7 ABC has not attempted to comply with permit requirements in good faith and it would be
8 unsound to allow ABC to mine where requirements, including safety requirements, are
9 unmet, notwithstanding that ABC has in fact continued to mine for the entire time from
10 2011 to the present day.

11 **B. The 2011 NOV Enforcement Violation Case**

12 After the District issued the NOV in May 2011, ABC requested a hearing, which
13 was held in September 2011 before Hearing Officer Harold J. Merkow. On October 11,
14 2011, Officer Merkow issued his Report and Recommendation to the District's Chief
15 Engineer, Timothy Phillips. On November 16, 2011, Chief Engineer Phillips issued a
16 Final Decision and Order in which he stated ABC was required to obtain a floodplain use
17 permit and pay a fine of \$1,000 per day from the date of the May 2011 NOV until the
18 violation is resolved and the fine is paid in full. On December 1, 2011, ABC requested
19 review of the Chief Engineer's Order and a hearing before the BoHR.

20 On January 25, 2012, the BoHR met with its then-attorney, Dean Wolcott, and
21 Chief Engineer Phillips. During this meeting, remarks were made that ABC believes
22 suggest the BoHR and the other individuals at the meeting were trying to avoid the issues
23 ABC had raised and the burden ABC had become to them. ABC characterizes this
24 meeting as an "*ex parte*" hearing. While Defendants concede that some comments made
25 were inappropriate, they contend the meeting was not in bad faith and the BoHR was
26 trying to learn about the hearing process because it was the first time it had held such a
27 hearing.
28

1 The BoHR held a hearing on March 28, 2012, and on June 27, 2012, it issued its
 2 Order in favor of ABC and reversed the Order of the Chief Engineer. On July 31, 2012,
 3 the District appealed the BoHR's Order to the Maricopa County Superior Court, and in
 4 May 2013, the Superior Court remanded the matter back to the BoHR with instructions to
 5 provide findings of fact and conclusions of law. ABC appealed that decision and the
 6 Arizona Court of Appeals affirmed in July 2014, thus remanding the case back to the
 7 BoHR. On January 28, 2015, the BoHR issued its Final Decision and Order on Remand.
 8 It found that the submission of application fees alone does not constitute a sufficient
 9 application and thus, no effective permit was currently in place. In other words, on
 10 remand, the BoHR upheld the Chief Engineer's decision that ABC was required to obtain
 11 and maintain a floodplain use permit and pay the appropriate fees to do so. It also found,
 12 however, that the Chief Engineer's decision to assess a fine of \$1,000 per day that ABC
 13 operated without a permit was arbitrary.

14 On March 4, 2015, ABC appealed the BoHR's second Order to the Maricopa
 15 County Superior Court. The Superior Court, on March 18, 2016, issued a decision
 16 slightly modifying the wording of the BoHR's Order, but otherwise affirming. On April
 17 22, 2016, ABC appealed the Superior Court's decision to the Arizona Court of Appeals,
 18 and the appeal is pending.

19 **C. The Parties' 2013 Federal Court Case**

20 On December 18, 2012, ABC filed a state court action against Maricopa County,
 21 the District, and individual Defendants and their spouses affiliated with the District.⁵
 22 Defendants removed the case to this Court on January 9, 2013, and the case was assigned
 23 to District Court Judge Wake. On November 18, 2013, Judge Wake dismissed the case
 24 because he found the claims were not ripe, and the Ninth Circuit Court of Appeals
 25 affirmed with regard to ABC's federal claims. *See ABC Sand & Rock Co. v. Maricopa*

26 ⁵ These individuals include: Timothy Phillips and Jane Doe Phillips, Jack Guzman
 27 and Jane Doe Guzman, Mike Jones and Jane Doe Jones, Ed Raleigh and Jane Doe
 28 Raleigh, Dewayne Justice and Jane Doe Justice, Melvin Martin and Jane Doe Martin,
 Hemant Patel and Jane Doe Patel, Scott Ward and Jane Doe Ward, Wylie Bearup and
 Jane Doe Bearup, and Jane and John Doe county employees.

1 *Cty.*, No. CV-13-00058-PHX-NVW, 2013 WL 6059296, at *3–5 (D. Ariz. Nov. 18,
 2 2013), *aff’d in part as modified sub nom. ABC Sand & Rock Co. Inc. v. Cty. of Maricopa*,
 3 627 F. App’x 626 (9th Cir. 2015).

4 **D. The 2015 NOV Enforcement Violation Case**

5 On May 8, 2015, the District issued a second NOV against ABC. On March 7,
 6 2016, after a hearing was held on the second NOV before Hearing Officer Merkow,
 7 Officer Merkow issued a recommended decision that Chief Engineer William Wiley
 8 enter an order directing, in part, that ABC immediately obtain an approved permit for its
 9 mining operations and cease and desist its operations until it obtains such permit. On
 10 March 21, 2016, Chief Engineer Wiley issued a Final Decision and Order requiring ABC
 11 to cease and desist mining operations in the floodplain of the Agua Fria River and to
 12 comply with relevant regulations by obtaining a floodplain use permit based upon a plan
 13 showing past and proposed operations within the floodplain of the Agua Fria River. The
 14 Order also required that ABC pay fines for certain periods of time.

15 ABC requested review of the Order, and the BoHR held a hearing on June 16,
 16 2016. The BoHR issued a Final Decision and Order on July 1, 2016. It found ABC had
 17 continued to operate without a floodplain use permit since its last Permit for Short
 18 Duration expired in July 2012 and ordered that ABC obtain a permit if it wished to
 19 continue operations, thus upholding the cease and desist order. On August 4, 2016, after
 20 the Court held the Preliminary Injunction hearing in this matter, ABC appealed the
 21 BoHR’s Order to the Maricopa County Superior Court.⁶

22 In sum, there are two pending actions that were ongoing when ABC filed the case
 23 in this Court—ABC’s appeal of the Superior Court’s decision to the Arizona Court of
 24 Appeals arising from the 2011 NOV enforcement action and ABC’s appeal of the
 25 BoHR’s decision to the Superior Court arising from the 2015 NOV enforcement action.

26 ⁶ The Court takes judicial notice of ABC’s new action in Maricopa County
 27 Superior Court. *See Lee*, 250 F.3d at 689; *Borneo*, 971 F.2d at 248. ABC filed a
 28 Complaint on August 1, 2016, in which it alleges similar constitutional claims as those at
 issue in this case.

1 **E. The Present Motions**

2 ABC now brings a Motion for Preliminary Injunction. ABC contends that it is
 3 likely to succeed on the merits of its First Amendment retaliation, due process, equal
 4 protection, and Arizona Constitution and Regulatory Bill of Rights claims. (Prelim. Inj.
 5 Mot. at 5–16.) ABC initially requested that the Court enjoin the District from enforcing
 6 the Chief Engineer’s March 21, 2016 Order and issue ABC a Permit of Short Duration
 7 for the remainder of ABC’s permit application process. (Prelim. Inj. Mot. at 18.) In its
 8 Supplemental Briefing and at the Preliminary Injunction Hearing, ABC amended its
 9 requested preliminary injunction relief. It asked the Court to issue an injunction requiring
 10 Defendants to give ABC 45 days’ notice “prior to filing or causing to be filed any action
 11 wherein the relief requested would enjoin, or have the practical effect of enjoining” ABC
 12 from continuing its mining operations. (Doc. 41-1 at 2.) In the alternative, ABC requested
 13 that the Court require the District to issue a Permit of Short Duration. (Doc. 41, Pl.’s
 14 Supp. Br. at 1.)

15 The BoHR Defendants move to dismiss this case pursuant to Federal Rule of Civil
 16 Procedure 12(b)(6). (BoHR Defs.’ MTD at 5.) The BoHR Defendants’ main arguments
 17 are that all personal claims against BoHR members should be dismissed on absolute
 18 immunity grounds and the Court should abstain on all official claims under *Younger*
 19 abstention. (BoHR Defs.’ MTD at 5.)

20 The District Defendants also move to dismiss this case pursuant to Federal Rules
 21 of Civil Procedure 12(b)(1) and (6), contending subject matter jurisdiction is lacking and
 22 ABC fails to state a claim upon which relief can be granted. (District Defs.’ MTD at 2.)
 23 The District Defendants argue: 1) ABC’s claims are not yet ripe; 2) ABC is barred by *res*
 24 *judicata*; 3) the Court lacks jurisdiction under the *Rooker-Feldman* doctrine; 4) ABC’s
 25 claim for injunctive relief is barred; and 5) the Court should abstain under the *Younger*
 26 doctrine. (*See* District Defs.’ MTD at 10–17.)

27 Before reaching the underlying merits of the parties’ Motions, the Court must
 28 inquire into its subject matter jurisdiction and dismiss a case when jurisdiction is lacking.

1 See *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1116 (9th Cir. 2004); Fed. R. Civ. P.
 2 12(h)(3). The Court finds the jurisdictional issues of ripeness and *Younger* abstention are
 3 dispositive and thus does not consider the parties' other arguments.

4 **II. RIPENESS**

5 Federal courts are limited to deciding "cases" and "controversies." U.S. Const. art.
 6 III, § 2. Two closely related components of the Article III case or controversy
 7 requirement are standing and ripeness. *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th
 8 Cir. 2009). To establish standing, "a plaintiff must have suffered an injury in fact that is
 9 'concrete and particularized;' that can be fairly traced to the defendant's action; and that
 10 can be redressed by a favorable decision of the court." *Id.* (citing *Lujan v. Defenders of
 11 Wildlife*, 504 U.S. 555, 560–61 (1992)). "While standing is primarily concerned with *who*
 12 is a proper party to litigate a particular matter, ripeness addresses *when* litigation may
 13 occur," and prevents courts from deciding cases prematurely. *Id.* (internal citations
 14 omitted) (emphasis in original); *United States v. Lazarenko*, 476 F.3d 642, 649 (9th Cir.
 15 2007). When a claim is contingent upon future events that may not occur as anticipated,
 16 or at all, the claim is not ripe for adjudication. *Bova*, 564 F.3d at 1096. This is because,
 17 "if the contingent events do not occur, the plaintiff likely will not have suffered an injury
 18 that is concrete and particularized enough to establish the first element of standing." *Id.*

19 Underlying all of ABC's claims and injuries is its allegation that the District
 20 engaged in vindictive and retaliatory actions against it. (*See* Doc. 18, Am. Compl. at 3.)
 21 ABC states the vindictive actions include indefensibly denying ABC's permit renewal in
 22 2011, demanding compliance with permit requirements that have no basis, selectively
 23 imposing permit requirements on ABC, and continuously changing or failing to fully
 24 disclose permit requirements, making it impossible for ABC to renew its permit and/or
 25 obtain a new permit. (Am. Compl. at 3.) As stated, the District has taken two NOV cease
 26 and desist enforcement actions against ABC in response to what the District views as
 27 ABC's noncompliance. ABC contends these actions, and the appeals processes that
 28 followed, are also part of the District's vindictive and retaliatory acts against it.

1 ABC has appealed the two District enforcement actions taken against it, and those
2 actions are now pending in the state courts. Because no final decision has been made as
3 to whether ABC has been mining unlawfully and without a permit, and because ABC
4 continues to engage in its mining operations, it is premature to conclude that ABC has
5 suffered a concrete and particularized injury. This is not the first time the Court has
6 arrived at this conclusion. In ABC's 2013 federal court action, Judge Wake found that
7 because ABC had appealed the Superior Court's Order on the 2011 NOV action, ABC's
8 claims—nearly identical to those here—were not ripe. Judge Wake stated the claims were
9 “not fit for decision because the validity of Plaintiff's Plant 1 permit still is being decided
10 by judicial review of the administrative proceedings.” *ABC Sand & Rock Co.*, 2013 WL
11 6059296, at *4. Indeed, Judge Wake's statement continues to be true. As indicated above,
12 the validity of that permit still is under judicial review before the Arizona Court of
13 Appeals.

14 The Court thus finds Judge Wake's reasoning just as persuasive and applicable in
15 the present case because ABC is now in the midst of the appeals process for both the
16 2011 and 2015 NOV enforcement actions. The Court acknowledges that the appeal and
17 NOV enforcement action process has been extensive. ABC's issues are still not fit for
18 decision, however, because they remain under judicial review and ABC has not yet
19 suffered a concrete and particularized injury. As Judge Wake noted, this case is unlike
20 *Carpinteria Valley Farms, Ltd. v. Cty. of Santa Barbara*, 344 F.3d 822, 830 (9th Cir.
21 2003), where the Ninth Circuit found plaintiff's constitutional claims were ripe because
22 he was deprived of commercial use of his land while awaiting a final decision on the
23 relevant property permit. The court stated in *Carpinteria* the plaintiff would have been
24 injured by the treatment he received through the procedure he contested—retaliation for
25 exercising his First Amendment rights and restricting him from playing polo on his
26 property for nine years while waiting for a major conditional use permit. The Court finds
27 the present cause distinguishable. *See id.*

28

1 Here, ABC also contests the procedure it has had to undergo in its attempt to
 2 renew and obtain a permit to mine. However, unlike *Carpinteria*, ABC has not been
 3 deprived commercial use of its land and has not paid the fines the District assessed
 4 against it in the NOVs. Thus, ABC has not shown that it has already suffered actual,
 5 concrete and particularized injury. *See id.* at 830–31. ABC’s ripeness defect from its 2013
 6 federal court action remains, and because the 2015 NOV enforcement action is also under
 7 judicial review, it is similarly not fit for decision by this Court. Because ABC has failed
 8 to meet the constitutional component of ripeness, the Court may not exercise jurisdiction
 9 and must dismiss ABC’s claims. *See Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir.
 10 2010). Although the Court must dismiss ABC’s claim on this basis, because the same
 11 factors that render the matter unripe—the nature of ABC’s claims and the posture of the
 12 underlying state actions—also implicate *Younger* abstention, the Court addresses that
 13 doctrine below.

14 **III. YOUNGER ABSTENTION**

15 *Younger* abstention is a jurisprudential doctrine rooted in the principles of equity,
 16 comity, and federalism. *See Steffel v. Thompson*, 415 U.S. 452, 460–73 (1974) (stating
 17 the history and purposes of the doctrine); *Younger v. Harris*, 401 U.S. 37, 43–49 (1971);
 18 (discussing the jurisprudential background of abstention); *San Jose Silicon Valley
 19 Chamber of Commerce Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1091–
 20 92 (9th Cir. 2008); *Gilbertson v. Albright*, 381 F.3d 965, 970–75 (9th Cir. 2004) (*en
 21 banc*) (following the Supreme Court’s application of the doctrine). The doctrine
 22 establishes an exception to mandatory federal jurisdiction, and the Court must dismiss the
 23 action under certain circumstances. *Baffert v. Cal. Horse Racing Bd.*, 332 F.3d 613, 617
 24 (9th Cir. 2003).

25

26

27

28

In civil cases . . . *Younger* abstention is appropriate only when the state proceedings: (1) are ongoing, (2) are quasi-criminal enforcement actions or involve a state’s interest in enforcing the orders and judgments of its courts, (3) implicate an important state interest, and (4) allow litigants to raise federal challenges. If these “threshold elements” are met, we then consider

1 whether the federal action would have the practical effect of enjoining the
 2 state proceedings and whether an exception to *Younger* applies. Each
 3 element must be satisfied, and the date for determining whether *Younger*
 4 applies is the date the federal action is filed.

5 *ReadyLink Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014)
 6 (internal citations and quotations omitted) (citing *Sprint Commc’ns, Inc. v. Jacobs*, 134 S.
 7 Ct. 584, 593–94 (2013)).

8 **A. Ongoing State Proceedings**

9 The first requirement for *Younger* abstention is met. The United States Supreme
 10 Court has held that *Younger* abstention applies where a losing litigant has not exhausted
 11 its state appellate remedies. *Dubinka v. Judges of Superior Court of State of Cal. for Cty.*
 12 *of L.A.*, 23 F.3d 218, 223 (9th Cir. 1994) (citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592,
 13 607–11 (1975)). Here, there were ongoing state judicial proceedings stemming from the
 14 2011 and 2015 NOV enforcement actions at the time ABC filed its Complaint in this
 15 Court on April 19, 2016 (Doc. 1). As of that date, the Superior Court had issued a
 16 decision on the 2011 action that ABC appealed three days after it filed its Complaint in
 17 this case, and the parties were awaiting their June 2016 hearing in front of the BoHR on
 18 the 2015 action. Thus, ABC was still pursuing its state appellate remedies and the
 19 proceedings were ongoing.

20 **B. Type of Cases in Which *Younger* Abstention Applies**

21 The enforcement actions the District initiated against ABC are the type of
 22 proceeding that triggers *Younger* abstention. “[O]nly exceptional circumstances justify a
 23 federal court’s refusal to decide a case in deference to the States.” *New Orleans Pub.*
 24 *Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 368 (1989) (“*NOPSI*”).
 25 Those “exceptional circumstances” exist in three types of proceedings: 1) state criminal
 26 prosecutions; 2) certain “civil enforcement proceedings;” and 3) “civil proceedings
 27 involving certain orders . . . uniquely in furtherance of the state courts’ ability to perform
 28 their judicial functions.” *Sprint Commc’ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013).

1 The Supreme Court has applied *Younger* to instances of civil enforcement where
 2 state proceedings are “akin to criminal prosecution” in “important respects.” *Sprint*, 134
 3 S. Ct. at 592. As the Supreme Court described:

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

48

49

50

51

52

53

54

55

56

57

58

59

60

61

62

63

64

65

66

67

68

69

70

71

72

73

74

75

76

77

78

79

80

81

82

83

84

85

86

87

88

89

90

91

92

93

94

95

96

97

98

99

100

101

102

103

104

105

106

107

108

109

110

111

112

113

114

115

116

117

118

119

120

121

122

123

124

125

126

127

128

129

130

131

132

133

134

135

136

137

138

139

140

141

142

143

144

145

146

147

148

149

150

151

152

153

154

155

156

157

158

159

160

161

162

163

164

165

166

167

168

169

170

171

172

173

174

175

176

177

178

179

180

181

182

183

184

185

186

187

188

189

190

191

192

193

194

195

196

197

198

199

200

201

202

203

204

205

206

207

208

209

210

211

212

213

214

215

216

217

218

219

220

221

222

223

224

225

226

227

228

229

230

231

232

233

234

235

236

237

238

239

240

241

242

243

244

245

246

247

248

249

250

251

252

253

254

255

256

257

258

259

260

261

262

263

264

265

266

267

268

269

270

271

272

273

274

275

276

277

278

279

280

281

282

283

284

285

286

287

288

289

290

291

292

293

294

295

296

297

298

299

300

301

302

303

304

305

306

307

308

309

310

311

312

313

314

315

316

317

318

319

320

321

322

323

324

325

326

327

328

329

330

331

332

333

334

335

336

337

338

339

1 hazards and accordingly, the District was created to adopt and enforce floodplain
 2 regulations consistent with the Director of Arizona Department of Water Resources's
 3 adopted criteria. *See Floodplain Regulations for Maricopa County § 102, Flood Control*
 4 *District of Maricopa County (2014);⁷ A.R.S. §§ 48-3601–650.* The Floodplain
 5 Regulations for Maricopa County explain the Regulations were adopted to mitigate and
 6 avoid significant flood hazards. Specifically, the Regulations provide:

7
 8 The flood hazard areas of Maricopa County are subject to periodic
 9 inundation that may result in loss of life and property, health and safety
 10 hazards, disruption of commerce and governmental services, extraordinary
 11 public expenditures for flood protection and relief, and impairment of the
 12 tax base, all of which adversely affect the public health, safety, and general
 13 welfare.

14 Floodplain Regulations for Maricopa County §§ 101(A), 103. In accordance with the
 15 District's mandate and mission to promote safety, the Regulations set forth under what
 16 circumstances a floodplain use permit is required, which includes an entity's extraction of
 17 sand and gravel in certain areas. *See Floodplain Regulations for Maricopa County § 401.*
 18 Because of the flood hazards and county land and residents at stake, Arizona has an
 19 important state interest in regulating the floodplain and mining therein. The state
 20 proceedings implicate this state interest because they determine whether ABC has met the
 21 requirements for a floodplain use permit established to promote the state's safety
 22 interests, and whether ABC has been mining in accordance with the Regulations.

23 In addition, “[w]hether the state proceedings are ‘judicial in nature’ or ‘quasi-
 24 criminal’ also plays a role in assessing the significance of the state interest.” *Baffert*, 332
 25 F.3d at 618. Here, the BoHR held adjudicatory hearings, which are quasi-judicial, and
 26 ABC’s permit was at issue, making the proceedings quasi-criminal. *See id.* These factors
 27 further support that the ongoing state proceedings implicate an important state interest.
 28 The Court finds the third *Younger* factor is met.

⁷ Available at:
http://www.fcd.maricopa.gov/downloads/permitting/Floodplain_Reg_Book.pdf.

1 **D. Opportunity to Litigate Federal Claims**

2 The fourth *Younger* factor requires that the state proceedings allow litigants to
 3 raise federal challenges. The Supreme Court has held that even if underlying
 4 administrative proceedings do not provide litigants with the opportunity to bring their
 5 constitutional challenges, it is sufficient that constitutional claims may be raised in state-
 6 court judicial review of the administrative proceeding. *Dayton*, 477 U.S. at 629 (citing
 7 *Middlesex*, 457 U.S. at 436). Here, the Regulations provide for, and ABC has availed
 8 itself of, state-court judicial review of the BoHR decisions. *See* Floodplain Regulations
 9 for Maricopa County § 409. ABC does not cite any persuasive authority that it is barred
 10 from raising its constitutional challenges in state court. The Court finds the fourth
 11 *Younger* element is also met.

12 **E. Exceptions to *Younger* Abstention**

13 The Court also considers whether any exception to *Younger* abstention applies.
 14 The Court must examine whether the state proceeding demonstrates bad faith,
 15 harassment, or some other extraordinary circumstances that would make abstention
 16 inappropriate. *Kenneally v. Lungren*, 967 F.2d 329, 332 (9th Cir. 1992). “Bias exists
 17 where a court has prejudged, or reasonably appears to have prejudged, an issue.” *Id.* at
 18 333. The party raising bias must overcome a presumption of honesty and integrity in
 19 those serving as adjudicators. *Id.* Bad faith typically means that a prosecution has been
 20 brought without a reasonable expectation of obtaining a valid conviction. *Baffert*, 332
 21 F.3d at 621.

22 ABC argues that the BoHR members’ actions demonstrate bad faith, bias, and
 23 disregard for ABC’s constitutional rights and thus constitute an “extraordinary
 24 circumstance” preventing ABC from raising its constitutional claims. (Pl.’s Resp. to
 25 BoHR Defs.’ MTD at 13.) In support of its bias argument, ABC points to statements
 26 made by BoHR members in an “*ex parte* hearing” that occurred in January 2012 while
 27 ABC’s appeal of the Chief Engineer’s Order was pending and before the BoHR hearing
 28 had occurred. ABC also states that it tried to raise the issue of bias at its March 2012

1 hearing before the BoHR, but the BoHR refused to hear ABC's constitutional arguments.
2 The Court also heard argument regarding bias at the Preliminary Injunction hearing and
3 reviewed the January 2012 meeting transcript. The Court is troubled by the inappropriate
4 comments made at the January 2012 "*ex parte*" meeting, some of which suggest some
5 Board members' predisposition against ABC. (*See* Pl.'s Prelim. Inj. Hr'g Ex. 33.) The
6 Court finds, however, that when looking at the broader context of ABC's multiple
7 hearings before the BoHR and Arizona state courts in the 2011 and 2015 NOV
8 enforcement actions, ABC has not overcome the presumption of honesty and integrity in
9 those serving as adjudicators. *See Kenneally*, 967 F.2d at 333. Nothing else in those
10 hearings or events surrounding those hearings shows that ABC has been subject to bias.
11 Indeed, the BoHR's June 2012 Order that issued after the March 2012 hearing wherein
12 ABC tried to raise bias found in favor of ABC. Moreover, the recent BoHR Order
13 recognized the District's faults and acknowledged that "the District has been at times less
14 than clear in providing specific deadlines for ABC." (Doc. 40, Ex. A, BoHR Final
15 Decision and Order, July 1, 2016 at 9.) The BoHR set forth recommendations for
16 establishing deadlines in the future, thus acknowledging that both ABC and the District
17 were at fault for misunderstandings. (Doc. 40, Ex. A, BoHR Final Decision and Order,
18 July 1, 2016 at 9–10.) ABC also has and will be able to present its case to the Maricopa
19 County Superior Court and the Arizona Court of Appeals and has presented no evidence
20 of those adjudicators' bias. The Court acknowledges that the comments at the January
21 2012 BoHR meeting were inappropriate and disconcerting, but it finds that in light of the
22 history of the BoHR's and state courts' review of ABC's case, ABC is unable to
23 overcome the presumption of the adjudicators' honesty and integrity.

24 As for the District's bad faith, the District had a reasonable expectation of
25 obtaining a valid "conviction" in both the 2011 and 2015 NOV enforcement actions. *See*
26 *Baffert*, 332 F.3d at 621. The Court finds it was not clear whether ABC was permissibly
27 mining in accordance with a valid permit and the Regulations at the relevant times. The
28 Court does not advance that either the District or ABC was correct in its position when

1 the NOV actions were initiated. Rather, the Court finds that given the degree of
 2 uncertainty as to ABC's rights, the District had some reasonable expectation that ABC
 3 would be found out of compliance with the applicable Regulations.

4 **F. Effect of Requested Relief**

5 After the threshold elements are met, for *Younger* abstention to apply, “[t]he
 6 requested [federal court] relief must seek to enjoin—or have the practical effect of
 7 enjoining—ongoing state proceedings.” *ReadyLink Healthcare*, 754 F.3d at 758.
 8 Although a “direct” interference is not a threshold requirement, there must be some
 9 interference with state court proceedings for *Younger* to apply. *AmerisourceBergen Corp.*
 10 *v. Roden*, 495 F.3d 1143, 1149 n.9 (9th Cir. 2007).

11 In its Amended Complaint, ABC requests the following injunctive relief:

12
 13 (1) Enjoin Defendants from continuing to violate ABC’s state and federal
 14 constitutional rights; (2) enjoin Defendants from further violating Arizona’s
 15 Regulatory Bill of Rights; (3) enjoin Defendants to honor the *de facto*
 16 permit they granted ABC in February 2015 for the duration of its current
 17 permit application process; (4) enjoin Defendants to process ABC’s current
 18 permit application in accordance with Arizona’s Regulatory Bill of Rights;
 19 and (5) enjoin the imposition of the arbitrary and capricious fine assessed
 20 on March 21, 201[6].

21 (Am. Compl. at 42–43.)

22 ABC’s requested relief is inextricably intertwined with the ongoing state
 23 proceedings. ABC’s federal claims are a constitutional challenge to the pending BoHR
 24 and state proceedings. In *Gilbertson*, the Ninth Circuit held that *Younger* principles
 25 applied to plaintiff’s § 1983 claim because the constitutional issues raised in his federal
 26 complaint, including First Amendment retaliation, due process, and equal protection, “go
 27 to the heart of his opposition to the Board’s action in the state proceeding, such that a
 28 federal court’s decision on the merits of [plaintiff’s] claims would have the same
 practical effect on the state proceeding as an injunction.” 381 F.3d at 979–82. Similarly,
 ABC has raised the same constitutional claims that go to the heart of its opposition to the

1 District's initial action and the BoHR's subsequent actions. The Court's determination of
2 those claims would interfere with the state proceedings as it "would frustrate the state's
3 interest in administering its judicial system, cast a negative light on the state court's
4 ability to enforce constitutional principles, and put the federal court in the position of
5 prematurely or unnecessarily deciding a question of federal constitutional law." *Id.* at
6 980. In addition, ABC requests that the Court enjoin Defendants from engaging in
7 unconstitutional conduct, which based on ABC's allegations includes the NOV
8 enforcement actions and hence the pending state court proceedings. Thus, ABC's request
9 would have the result of vacating the BoHR and state court decisions and halting the
10 pending proceedings.

11 ABC also requests that the Court require Defendants to honor and process its
12 mining permits and enjoin the imposition of fines, which are the precise issues of the
13 ongoing state proceedings. ABC's requested relief as to fines, some of which the BoHR
14 has upheld, would conflict with the BoHR's Order and prevent the Maricopa County
15 Superior Court from affirming and enforcing the Order. The Ninth Circuit has held that
16 where a requested injunction would prohibit a commission or other governmental entity
17 from imposing a fine against plaintiffs, the relief sought by plaintiffs would interfere and
18 effectively enjoin ongoing state proceedings, thus meeting the final *Younger* abstention
19 requirement. *See City of San Jose*, 546 F.3d at 1095–96 (holding plaintiffs' requested
20 relief against defendants to preclude them from enforcing a statute consequently
21 prohibited the Elections Commission from imposing fines against plaintiffs and
22 constituted the requisite interference or enjoining of state proceeding under *Younger*).

23 As to its permit, ABC requests that the Court require Defendants to honor their
24 February 2015 "*de facto*" permit and process their current permit application in
25 accordance with Arizona's Regulatory Bill of Rights. Such a determination would
26 conflict with the BoHR's factual determination underlying its decision to uphold fines. It
27 would also impede the state court's review of the facts on appeal because it conflicts with
28 the BoHR's Order. ABC's requested relief disrupts the State's efforts to protect its

1 interests that underlie the Floodplain Regulations and to obtain compliance with those
 2 regulations, further supporting that the requested relief would interfere with the ongoing
 3 state action. *See Huffman*, 420 U.S. at 604–05 (“Similarly, while in this case the District
 4 Court’s injunction has not directly disrupted Ohio’s criminal justice system, it has
 5 disrupted that State’s efforts to protect the very interests which underlie its criminal laws
 6 and to obtain compliance with precisely the standards which are embodied in its criminal
 7 laws”).

8 At the Preliminary Injunction Hearing and in its Supplemental Briefing, ABC
 9 amended its requested preliminary injunction relief. (Pl.’s Supp. Br. at 1.) It argued that
 10 its revised preliminary injunction request for 45 days’ notice prior to the filing of any
 11 action that would enjoin or have the practical effect of enjoining ABC from its mining
 12 operations was so narrow that it did not enjoin or have the practical effect of enjoining
 13 the state proceedings under *Younger*. (Pl.’s Supp. Br. at 1.) As in the cases cited, the
 14 Court considers the effect of the ultimate requested federal action under *Younger*, not the
 15 requested relief in a preliminary injunction motion. Were the Court to adopt ABC’s
 16 contention that it should only look at the preliminary injunction relief sought, it might be
 17 deciding the Preliminary Injunction Motion only to later find *Younger* abstention
 18 precluded the Court from exercising jurisdiction over the action at all. The Court also
 19 finds that despite ABC’s contention, its requested relief does not threaten merely a
 20 “potential” for conflict with the state proceedings, but rather, for the reasons stated, is
 21 completely intertwined and conflicts with the state proceedings.

22 The Court thus finds that ABC’s requested federal action would have the practical
 23 effect of enjoining the ongoing state proceedings.

24 IV. CONCLUSION

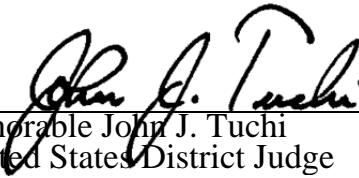
25 The Court finds it does not have jurisdiction over this matter because ABC’s
 26 claims are not yet ripe. The Court also determines it must abstain under *Younger* because
 27 all of the *Younger* elements are met, no exceptions apply, and ABC’s requested federal
 28 action would have the practical effect of enjoining the ongoing state proceedings.

1 Because the Court has found the case is not ripe, it will dismiss all of ABC's claims,
2 including its monetary damages claim, and not issue a stay. *See Gilbertson*, 381 F.3d at
3 981 (directing courts to stay, as opposed to dismiss, where monetary damages are sought
4 and *Younger* abstention is applied). In addition, because the Court finds it does not have
5 jurisdiction, it does not reach the other arguments in Plaintiff's Motion for Preliminary
6 Injunction and Defendants' Motions to Dismiss.

7 **IT IS THEREFORE ORDERED** denying Plaintiff ABC's Motion for a
8 Temporary Restraining Order with Notice and Preliminary Injunction (Doc. 2).

9 **IT IS FURTHER ORDERED** granting the BoHR Defendants' Motion to
10 Dismiss (Doc. 25) and the District Defendants' Motion to Dismiss (Doc. 37) on ripeness
11 and abstention grounds. All other pending motions are denied as moot. The Clerk of the
12 Court shall enter judgment accordingly and close this matter.

13 Dated this 29th day of August, 2016.

14 
15 _____
Honorable John J. Tuchi
16 United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28